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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ASGEDOM YEHDEGO,

Plaintiff and Appellant,

v.

STEVEN ZAER et al.,

Defendants and  
Respondents.

B282211

(Los Angeles County  
Super. Ct. No. BC577407)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael J. Raphael, Judge. Affirmed.

Odiase Law Group, Charles U. Odiase, Robert Shtofman, and Michael Hailu for Plaintiff and Appellant.

Littler Mendelson and David S. Maoz for Defendants and Respondents.

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Plaintiff Asgedom Yehdego appeals from a judgment entered after the trial court granted summary judgment in favor of defendants Steven Zaer and Greyhound Lines, Inc. (collectively, defendants) in this action alleging employment discrimination. Below, Yehdego did not oppose defendants' summary judgment motion on the merits. Instead, in his written opposition, he asked the trial court to deny the motion under Code of Civil Procedure section 437c, subdivision (h),<sup>1</sup> arguing facts essential to oppose the motion may exist, but defendants precluded him from discovering such facts by failing to produce witnesses and documents for deposition. After hearing oral argument from the parties and asking Yehdego's counsel to identify the essential facts that may be discoverable and sufficient to defeat summary judgment, the trial court granted defendants' motion, finding Yehdego failed to meet his burden for denial of the motion under section 437c, subdivision (h). Finding no abuse of the trial court's discretion, we affirm the judgment.

### **BACKGROUND**

In or around 1987, defendant Greyhound Lines, Inc. hired Yehdego as a bus mechanic. At the time Yehdego filed this action in April 2015, defendant Steven Zaer was his immediate supervisor.

In his complaint in this action, Yehdego asserts causes of action for (1) race and national origin discrimination, (2) failure to prevent discrimination, (3) harassment, (4) wrongful termination in violation of public policy, (5) intentional infliction of emotional distress, (6) negligent supervision, (7) disability discrimination, (8) failure to accommodate disability, and (9)

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<sup>1</sup> Statutory references are to the Code of Civil Procedure.

failure to engage in good faith interactive process. He alleges he has experienced discrimination and harassment at work based on his race (African-American) and national origin (as an immigrant from Ethiopia), including being passed over for promotions to supervisory positions. In early 2012, he was injured on the job.<sup>2</sup> He claims defendants failed to accommodate the work restrictions resulting from his injuries.

In November 2016, defendants moved for summary judgment/adjudication, arguing (1) all causes of action in the complaint were barred by the applicable statutes of limitations, (2) Yehdego could not prove any disability-related cause of action because he was unable to “perform his job duties as a mechanic due to his physical restrictions and no alternate suitable positions were available,” and (3) he could not prove any race-related cause of action because he could not “establish that any employment decisions were motivated by discriminatory animus, in whole or in part and did not adversely affect the terms and conditions of [his] employment.” Defendants explained Greyhound had accommodated Yehdego’s injuries “with a continual leave of absence,” and argued Greyhound “was under no obligation to promote [Yehdego] or create a new permanent position for him” so he could return to work.<sup>3</sup>

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<sup>2</sup> Yehdego does not describe the injury in his complaint or his opposition to the summary judgment motion. Defendants state in their motion for summary judgment that Yehdego injured his right hand, arm, and shoulder.

<sup>3</sup> At the time the summary judgment motion was heard, Yehdego remained on leave.

In December 2016, about a month after defendants filed their summary judgment motion, Yehdego filed an ex parte application for an order continuing the hearing on defendants' motion, as well as the trial and related dates. He asserted defendants had failed to produce witnesses and documents for depositions, and he attached to his ex parte application a copious amount of correspondence with opposing counsel concerning these discovery issues.

After a hearing, at which defendants did not oppose the ex parte application, the trial court issued an order continuing the trial from February 18, 2017 to April 4, 2017, as well as all dates related to trial. The court denied Yehdego's request for a continuance of the hearing on defendants' summary judgment motion.<sup>4</sup>

On January 13, 2017, Yehdego filed his opposition to defendants' summary judgment motion. Therein, he did not address the merits of defendants' motion. Nor did he file a separate statement, indicating which of defendants' facts were disputed/undisputed and listing additional facts on which he opposed the motion. He made two arguments in his opposition: (1) defendants served the motion with insufficient notice—an argument he does not repeat on appeal, and (2) the trial court should deny defendants' motion under section 437c, subdivision (h), because "facts essential to justify opposition may exist but cannot be presented because defendants failed and refused to produce for deposition their persons(s) most knowledgeable,

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<sup>4</sup> The order does not state the reasons for the trial court's denial, and the record on appeal does not include a reporter's transcript from the hearing.

employees and documents material to the rights and liabilities of the parties.”

In support of the latter argument, Yehdego again attached voluminous correspondence with opposing counsel concerning discovery issues. In his opposition, he listed the following issues additional discovery may reveal: (1) “whether [his] termination in the early-1990’s was unlawful as opposed to for gross misconduct and violation of a company safety rule, as suggested” by defendants,<sup>5</sup> (2) “that Zaer was a managing agent of Greyhound, based on his authority or influence to affect corporate policy,” (3) that Greyhound “did not have practices in place to ensure that its policies were adhered to,” and (4) “whether the Leadman position (also known as the Working Foreman position was available for [Yehdego] [citation], whether the Leadman position required as much physical activity as a mechanic [citation], and whether [Yehdego] was well qualified for the position and denied it for unlawful reasons . . . .” Yehdego listed these facts, without placing them in context or explaining how they could raise a triable issue of material fact as to any of his causes of action.

In their reply brief in support of their summary judgment motion, defendants disputed Yehdego’s characterization of the discovery issues. They summarized the discovery already conducted, attached correspondence from their counsel providing dates on which Yehdego could depose their witnesses (to which Yehdego’s counsel apparently never responded), and noted

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<sup>5</sup> Apparently, Greyhound fired Yehdego more than 20 years before he filed this action, and he was reinstated after he filed a grievance with his union.

Yehdego had not filed any motions to compel the depositions or documents he now sought.<sup>6</sup> They also noted Yehdego had obtained and produced to defendants eight signed declarations from current and former Greyhound employees, none of which he submitted with his opposition to the summary judgment motion. Defendants urged the trial court to reject Yehdego's request for additional discovery because he did not show how additional evidence could defeat the summary judgment motion.

During the February 3, 2017 hearing on defendants' motion for summary judgment/summary adjudication, the trial court asked Yehdego's counsel multiple times to explain what essential facts may exist to defeat the motion. Yehdego's counsel listed the following: (1) testimony from Zaer and documents showing whether he engaged in a good faith interactive process with Yehdego and conducted an investigation to find a reasonable accommodation, (2) testimony from Zaer regarding his long-standing "problem" with Yehdego, (3) testimony and documents from the person most knowledgeable showing whether "job vacancies existed at the time [Yehdego] requested a return to work," and (4) testimony and documents from the person most knowledgeable regarding Greyhound's policies and guidelines concerning racial harassment, national origin discrimination, and disability issues.

The same day as the hearing, the trial court issued a written ruling granting defendants' summary judgment motion.

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<sup>6</sup> In his opening appellate brief, Yehdego states, without citation to the record, that he filed a motion to compel the depositions of defendants' witnesses, and the court granted the motion. No such motion or order is included in the record before us.

The Court found Yehdego “fail[ed] to meet his burden of identifying what additional, essential facts are missing and could be ascertained from engaging in additional discovery.” The court considered the areas of additional discovery Yehdego listed in his motion and at the hearing and stated, “These speculative statements do not identify any essential facts. Even so, these statements do not suggest any plausible opposition could come of them.” For example, the court noted Yehdego “offers no suggestions of facts that could tend to show anything about the leadman position, whether [Yehdego]’s work restrictions fell below the required physical duties required of the leadman, or anything about his qualifications.” The court also found “the record reveals that defendants have been sufficiently responsive in the course [of] discovery during the pendency of the case filed on April 2, 2015.”

On April 5, 2017, the trial court entered judgment in favor of defendants.

### **DISCUSSION**

Yehdego contends the trial court erred in declining to grant a continuance of defendants’ summary judgment motion to allow him to conduct additional discovery pursuant to section 437c, subdivision (h).

This statutory provision provides, in pertinent part: “If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication, or both, that facts essential to justify opposition may exist but cannot, for reasons stated, be presented, the court shall deny the motion, order a continuance to permit affidavits to be obtained or discovery to be had, or make any other order as may be just.” (§ 437c, subd. (h).) “The affidavit or declaration in support of the

continuance request must detail the specific facts that would show the existence of controverting evidence.” (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 715.)

Where a continuance is not mandatory because the party requesting it failed to meet the “conditions” set forth in section 437c, subdivision (h), we review the denial of the continuance for abuse of discretion. (*Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 313-314.)

Yehdego submitted two declarations from his attorneys with his opposition to defendants’ summary judgment motion. Neither declaration listed any facts he believed could defeat the summary judgment motion. Instead, the declarations detailed discovery issues and sufficiency of notice of the summary judgment motion. Because he failed to submit declarations “detail[ing] the specific facts that would show the existence of controverting evidence,” he did not comply with the conditions set forth in section 437c, subdivision (h), and a continuance was not mandatory. (*Lerma v. County of Orange, supra*, 120 Cal.App.4th at p. 715.) Therefore, we review whether the trial court abused its discretion in denying the continuance. (*Scott v. CIBA Vision Corp., supra*, 38 Cal.App.4th at pp. 313-314; *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 255 [attorney’s declaration “failed to explain how the outstanding discovery was necessary for appellant’s opposition. Based on this deficiency alone, the trial court had the discretion to deny appellant’s request for a continuance, and such a denial was not an abuse of discretion”].)

As set forth above, Yehdego included two paragraphs in his opposition, listing general categories of information he believed were essential to oppose the summary judgment motion. These categories of information were completely out of context because



he did not include a statement of background facts in his opposition, describing the circumstances of his employment, his injury, his work restrictions, or his qualifications for an alternate position. He did not set forth his theory of the case or state which of defendants' facts he disputed. Nor did he explain how any of the categories of information he sought could show a triable issue of material fact on a particular cause of action. These deficiencies made it impossible for the trial court (and this court) to determine if any of the information Yehdego sought was "essential to justify opposition" to the summary judgment motion. (§ 437c, subd. (h).)

We need not address whether Yehdego was diligent in seeking discovery during the nearly two years the case was pending prior to the hearing on the summary judgment motion because we conclude the trial court did not abuse its discretion in denying the continuance because Yehdego never explained how additional discovery could aid him in defeating the summary judgment motion.

### **DISPOSITION**

The judgment is affirmed. Respondents are entitled to recover costs on appeal.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.